Ismail bin Muda v Danaharta Urus Sdn Bhd

COURT OF APPEAL (PUTRAJYA) — CIVIL APPEAL NO T–02–557 OF 2004
ABDUL AZIZ MOHAMAD, JAMES FOONG AND ZALEHA ZAHARI JJCA
6 DECEMBER 2006

Civil Procedure — Injunction — Injunction for preservation of property — Application by Danaharta to preserve value of land — Injunction to restrain defendant from carrying out excavation and quarrying activities on land and preventing access to land — Whether any triable issues — Whether damages would be adequate remedy — Pengurusan Danaharta Nasional Bhd Act 1998 s 57(1) & (6); National Land Code 1965 Fifteenth Schedule

Land Law — Possession — Recovery of — Application by Danaharta to preserve value of charged land — Whether Danaharta had power to take possession of land — Whether Danaharta would require approval of court to enter into land — Pengurusan Danaharta Nasional Bhd Act 1998 s 57(1) & (6); National Land Code 1965 Fifteenth Schedule

Pursuant to agreements via letters dated 5 October 1981 and 20 August 1983 ('the loan agreements') Bank Bumiputra Malaysia Bhd ('the bank') had agreed to extend credit facilities totaling RM3,402,365.85 ('the loan') to Gabungan Ismail Penarek Sdn Bhd ('Gabungan') upon the request of Gabungan. The loan was secured, inter alia, by third party charges over immovable property belonging to the appellant ('the charged land') in favour of the bank. Due to failure to settle the debt to the bank, Gabungan's loan then became a non-performing loan under the applicable banking rules. On 7 May 1999, the respondent acquired from the bank by way of statutory vesting under s 14 of the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Danaharta Act') the rights, title and interest relating to the loan to Gabungan. Notice of the statutory vesting was given to Gabungan by the bank and the respondent. The respondent's interest as chargee of the charged land had been registered at the Kuala Terengganu Land Registry. It was the respondent's case that s 57 of the Danaharta Act and para 5 of the Fifteenth Schedule to the National Land Code 1965 ('the Code') conferred upon them the right to sell the charged land by way of private treaty. In exercise of this right they had entered into a sale and purchase agreement dated 1 July 2002 with a purchaser. By reason of the respondent's inability to fulfil its obligations under the sale and purchase agreement to deliver vacant possession of the charged land as a result of the appellant's failure to vacate the charged land, the purchaser had terminated the sale and purchase agreement effective from 1 April 2003. The respondent's complaint was that its employees, servants and agents had been prevented from entry and access onto the charged land contrary to their entitlement in law to possession and control of the charged land. Access to the charged land could only be made via an adjacent land owned by the appellant ('the appellant's adjacent land'). On 13 September 2003, the respondent filed for interim orders pending trial: (1) restraining the defendant from carrying out/on any

form of excavation and/or quarrying and/or mining activity/operations whatsoever or from carrying out/on any other form of development whatsoever on the said land, until further order of the court; and (2) permitting the respondent, its servants and/or agents to enter upon and to take possession of the said land including fixtures and fittings on the said land and other things attached thereto, pending further order by the court.

The respondent's contention was that an order of possession of the charged land should be granted to them in order to, inter alia, preserve the value of the charged security and/or facilitate any future sale of the said land by private treaty. On the restraining order sought by the respondent, it was contended that they would suffer irreparable loss and damage in the value of the charged land if the excavation and quarrying activities of the appellant on the charged land was not restrained pending the adjudication and determination of their action against the appellant. The appellant on the other hand disputed that Gabungan was indebted to the respondent as alleged. In opposing the respondent's application for an interim order pending trial, the appellant's case was that, as the registered proprietor of the charged land, he was entitled to peaceful possession and enjoyment thereof. The appellant then contended that the respondent had to proceed under ss 270–277 of the National Land Code 1965 ('the Code') concerning 'Remedies of Chargees: Possession' in order to recover possession of the charged land; that a chargee is only entitled to possession of the charged land in the limited circumstances set out in Chapter 4 of Part Sixteen of the Code and that the respondent's application was contrary to s 44 of the Code. The issue before the court was whether the respondent had discharged the initial burden that lies on them of showing that there were issues to be tried. The High Court judge allowed the respondent's application. The appellant appealed.

Held, dismissing the appeal with costs:

(1) The appellant had disputed Gabungan's indebtedness in this suit. He also instituted separate proceedings challenging the validity of the charges which were also the basis upon which this suit was grounded. The court also noted that the appellant's attempt to strike out this case based on the same arguments was unsuccessful. The appellant had filed an appeal against the decision of the High Court dismissing the striking out application vide Court of Appeal Civil Appeal No T–02–564 of 2004, and in January 2006, that appeal had, with the consent of the respondent, been withdrawn with no order as to costs. By his conduct in withdrawing that earlier appeal, it could be inferred that the appellant had accepted that there were issues to be tried in this case (see para 22).

(2) Giving the words in s 57(1) of the Danaharta Act their plain and ordinary meaning, prima facie it would appear that the respondent was entitled under s 57(1) to take steps to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land so as to inspect, protect, secure, maintain or repair the land. Under s 57(6), the rights under s 57(1) are exercisable without the need for any approval, confirmation or order of court (see para 23).

(3) The amendment of the Code by the inclusion of a new Fifteenth Schedule under the heading 'Modifications to facilitate the implementation of the Danaharta Act' reinforces the rights and powers of Danaharta and its subsidiaries. The special provisions in para 4A of the Fifteenth Schedule confer upon Danaharta, in addition to the rights of a chargee under the Code, the right to employ guards to protect and secure the land and all buildings on the land; and pursuant to para 10, the rights under the Fifteenth Schedule are also exercisable without the need for any approval, confirmation or order of court. Thus, for Danaharta to have the power to secure and protect the charged land, they must, by necessary implication, have the power to take possession of it (see para 24).

(4) On the application of whether damages would be an adequate remedy and where the balance of convenience lie, it could not be denied that carrying out quarrying and excavation activities on the charged land would result in the depletion of the natural resources and diminution in value and quality of the land bearing in mind the fact that the charged land had only a leasehold tenure of 30 years expiring on 8 June 2010. Therefore in the circumstances of the present case, in the event of the respondent succeeding at the trial, damages would not be an adequate remedy (see para 26).

[Bahasa Malaysia summary

Menurut perjanjian-perjanjian melalui surat-surat bertarikh 5 Oktober 1981 dan 20 Ogos 1983 (('perjanjian-perjanjian pinjaman tersebut') Bank Bumiputra Malaysia Bhd ('bank tersebut') telah bersetuju untuk memberikan kemudahan kredit berjumlah RM3,402,365.85 ('pinjaman tersebut') kepada Gabungan Ismail Penarek Sdn Bhd ('Gabungan') atas permohonan Gabungan. Pinjaman tersebut dicagarkan, antara lain, oleh gadaian pihak ketiga ke atas hartanah tak boleh alih milik perayu ('tanah gadaian') menyebelahi bank tersebut. Akibat kegagaln untuk menyelesaikan hutang bank tersebut, pinjaman Gabungan kemudian menjadi pinjaman tidak terlaksana di bawah peraturan-peraturan terpakai perbankan. Pada 7 Mei 1999, responden memperoleh daripada bank tersebut melalui letakhak berkanun di bawah s 14 Akta Pengurusan Danaharta Nasional Bhd 1998 ('Akta Danaharta') hak-hak, hak milik-hak milik dan kepentingan berkaitan dengan pinjaman tersebut kepada Gabungan. Notis letakhak berkanun diberikan kepada Gabungan oleh bank tersebut dan responden. Kepentingan responden sebagai pemegang gadaian tanah gadaian telah didaftarkan di Pejabat Pendaftar Kuala Terengganu. Adalah kes responden bahawa s 57 Akta Danaharta dan perenggan 5 Jadual Kelima belas kepada Kanun Tanah Negara 1965 ('Kanun tersebut') memberikan mereka hak untuk menjual tanah gadaian melalui triti persendirian. Dalam menggunakan hak ini mereka telah memasuki satu perjanjian jual beli bertarikh 1 Julai 2002 dengan seorang pembeli. Atas alasan ketidakmampuan responden untuk memenuhi obligasinya di bawah perjanjian jual beli tersebut untuk menyerahkan milikan kosong tanah gadaian akibat kegagalan perayu mengosongkan tanah gadaian tersebut, pembeli telah menamatkan perjanjian jual beli tersebut berkuat kuasa dari 1 April 2003. Aduan responden adalah bahawa pekerja-pekerja, pekhidmat-pekhidmat dan ejen-ejennya telah dihalang daripada masuk ke tanah gadaian tersebut bercanggah dengan hak milikan dan kawalan mereka ke atas tanah gadaian tersebut di sisi undang-undang. Jalan masuk

ke tanah gadaian tersebut hanya boleh dibuat melalui sebidang tanah bersebelahan milik perayu ('the appellant's adjacent land'). Pada 13 September 2003, responden telah memfailkan perintah-perintah interim menunggu perbicaraan selesai: (1) menghalang defendan daripada menjalankan apa-apa penggalian dan/atau menguari dan/atau kegiatan/operasi melombong apa sekalipun atau melaksanakan apa-apa bentuk pembangunan lain atas tanah tersebut, sehingga perintah mahkamah selanjutnya; dan (2) membenarkan responden, pekerja-pekerja dan/atau ejen-ejennya memasuki dan mengambil milikan tanah tersebut termasuklah lekapan-lekapan dan kelengkapan atas tanah tersebut dan barangan lain yang terdapat atasnya, sementara menunggu perintah selanjutnya oleh mahkamah.

Hujah responden adalah bahawa satu perintah milikan tanah gadaian tersebut patut diberikan kepada mereka bagi tujuan, antara lain, mengekalkan nilai cagaran yang digadaikan dan/atau memudahkan apa-apa jualan tanah tersebut di masa hadapan melalui triti persendirian. Berdasarkan perintah sekatan yang dipohon oleh responden, adalah dihujahkan bahawa mereka akan mengalami kehilangan dan kerugian yang tidak boleh dipulihkan dalam nilai tanah gadaian tersebut jika kegiatan-kegiatan penggalian dan penguarian perayu ke atas tanah gadaian tersebut tidak dihalang sementara menunggu penghakiman dan keputusan tindakan mereka terhadap perayu. Perayu sebaliknya mempertikaikan bahawa Gabungan terhutang kepada responden seperti yang dikatakan. Dalam membangkang permohonan responden untuk satu perintah interim sementara menunggu perbicaraan selesai, kes perayu adalah, sebagai tuanpunya berdaftar tanah gadaian tersebut, beliau berhak menikmati milikan tanah tersebut. Perayu kemudian berhujah bahawa responden telah mengambil tindakan undang-undang di bawah ss 270–277 Kanun Tanah Negara 1965 ('Kanun tersebut') berkaitan 'Remedies of Chargees: Possession' bagi tujuan mendapat milikan tanah gadaian tersebut; bahawa pemegang gadaian hanya berhak terhadap milikan tanah gadaian tersebut dalam keadaan yang terhad seperti yang ditetapkan dalam Bab 4 Bahagian Enam Belas Kanun tersebut dan bahawa permohonan responden adalah bertentangan dengan s 44 Kanun tersebut. Persoalan di hadapan mahkamah tersebut adalah sama ada responden telah melepaskan beban asalnya yang terletak atas mereka untuk menunjukkan bahawa terdapat isu-isu yang perlu dibicarakan. Hakim Mahkamah Tinggi telah membenarkan permohonan responden. Perayu telah mengemukakan rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Perayu telah mempertikaikan keberhutangan Gabungan dalam guaman ini. Beliau juga telah memulakan prosiding berasingan mencabar kesahan gadaian yang juga merupakan asas guaman ini dimulakan. Mahkamah juga mengambil maklum bahawa percubaan perayu untuk membatalkan kes ini berdasarkan hujah-hujah yang sama tidak berjaya. Perayu telah memfailkan satu rayuan terhadap keputusan Mahkamah Tinggi menolak permohonan pembatalan melalui Rayuan Sivil Mahkamah Rayaun No T–02–564 tahun 2004, dalam bulan Januari 2006, rayuan tersebut telah, dengan persetujuan responden, ditarik balik tanpa perintah terhadap kos. Melalui perbuatannya menarik balik rayuan sebelumnya, ia bolehlah dianggap bahawa perayu telah menerima bahawa terdapat isu-isu yang perlu dibicarakan dalam kes ini (lihat perenggan 22).

(2) Dengan memberikan perkataan-perkataan dalam s 57(1) Akta Danaharta maksud jelas dan biasa, prima facie ia kelihatan bahawa responden berhak di bawah s 57(1) untuk mengambil langkah-langkah mengekalkan nilai tanah tersebut atau memudahkan jualan tanah tersebut melalui triti persendirian, termasuklah memasuki tanah tersebut untuk memeriksa, melindungi, menyenggara atau memperbaiki tanah tersebut. Di bawah s 57(6), hak-hak di bawah s 57(1) boleh digunakan tanpa memerlukan apa-apa kebenaran, pengesahan atau perintah mahkamah (lihat perenggan 23).

(3) Pindaan kepada Kanun tersebut dengan kemasukan Jadual Kelima Belas yang baru di bawah kepala tajuk 'Modifications to facilitate the implementation of the Danaharta Act' mengukuhkan hak dan kuasa Danaharta dan subsidiarinya. Peruntukan istimewa dalam perenggan 4A Jadual Kelima Belas memberikan kepada Danaharta, sebagai tambahan kepada hak-hak pemegang gadaian di bawah Kanun tersebut, hak untuk mengambil pengawal bekerja untuk melindungi dan mengawasi tanah tersebut dan semua bangunan atas tanah tersebut; dan menurut perenggan 10, hak-hak di bawah Jadual Kelima Belas juga boleh digunakan tanpa memerlukan apa-apa kebenaran, pengesahan atau perintah mahkamah. Oleh itu, untuk Danaharta mempunyai kuasa untuk melindungi dan mengawasi tanah gadaian tersebut, mereka hendaklah, secara tak langsung menunjukkan bahawa mempunyai kuasa untuk mengambil milikan tersebut (lihat perenggan 24).

(4) Berdasarkan permohonan sama ada ganti rugi adalah remedi yang mencukupi dan di mana imbangan kesesuaian terletak, adalah tidak dinafikan bahawa pelaksanaan kegiatan penguarian dan penggalian atas tanah gadaian tersebut hanya mempunyai tempoh pegangan pajakan selama 30 tahun yang luput pada 8 Jun 2010. Oleh itu dalam keadaan kes semasa, sekiranya responden berjaya dalam perbicaraan, ganti rugi bukanlah remedi yang mencukupi (lihat perenggan 26).]

Notes

For a case on injunction for preservation of property, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 2687.

For cases on recovery of possession, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3407–3420.

Cases referred to

American Cyanamid Co v Ethicon [1975] 1 All ER 504 (refd)

Legislation referred to

Companies Act 1965
Interpretation Acts 1948 and 1967 s 17A
National Land Code 1965 ss 270, 271, 272, 273, 274, 275, 276, 277, Fifteenth Schedule
Pengurusan Danaharta Nasional Berhad Act 1998 ss 14, 57, 60(1), (2)
Rules of the High Court 1980 O 29

Appeal from: Civil Suit No 22–55 of 2003 (High Court, Kuala Terengganu)

Dato' Mahinder Singh Dulku (Mohd Hussin Ibrahim with him) (Mohd Hussain Ibrahim & Co) for the appellant.

S Nantha Balan (Vijay Ray with him) (Zul Rafique & Partners) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] It was the unanimous decision of this court on 18 April 2006 that this appeal be dismissed with costs. The High Court judge's decision dated 7 June 2004 allowing the respondent's application in encl (3) was affirmed. We now state our reasons for doing so.

[2] The principles guiding courts whether to allow an interlocutory relief before trial are clear. A plaintiff seeking interlocutory relief must establish a prima facie case of a breach of its rights. Courts must however be mindful of the words of Lord Diplock in *American Cyanamid Co v Ethicon* [1975] 1 All ER 504 at p 510 that it is no part of the court's function at this stage of litigation to resolve conflicts of evidence as to the facts on which the claim of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. A decision at this stage must necessarily be based on facts which are not disputed or deemed admitted.

[3] The issues for determination in this appeal revolve around whether there are issues to be tried, whether damages would be an adequate remedy and where the balance of convenience lies.

[4] Before dealing with the background facts and rival contentions leading to this application, I propose to set out the statutory provisions raised in arguments in this application. They are as follows:

(a) PENGURUSAN DANAHARTA NASIONAL BERHAD ACT 1998

PART VII

ADDITIONAL RIGHTS

57. (1) Notwithstanding any other law and in addition to any other power the Corporation may have under … any other law, the Corporation … as holder of any security, whether as chargee … assignee … or otherwise, over any property shall be entitled —

(a) to dispose of such property …. by way of private treaty; and

(b) where such property consists of land, to take all steps as it deems fit to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land … to inspect, protect, secure, maintain or repair the land.

...

...

(6) The Corporation's rights under subsection (1) —

(a) may be exercised notwithstanding any order for sale made pursuant to any rules of the court, the National Land Code … or any other law …

(b) be exercised without the need for any approval, confirmation or order of court;

...

...

PART IX

APPLICATION OF THE ACT

60. (1) Subject to subsections (2), (3) and (4), the provisions of Parts... VII... of this Act shall apply to every subsidiary of the Corporation prescribed under subsection (2) as if the subsidiary is the Corporation itself.

...

...

(b) THE NATIONAL LAND CODE

5C. (1) Upon the coming into force of the Pengurusan Danaharta Nasional Berhad Act 1998, the Fifteenth Schedule which provides for the modifications to the National Land Code to facilitate the implementation of the Pengurusan Danaharta Nasional Berhad Act 1998 shall apply and the Act shall be read subject to the provisions of the Schedule.

FIFTEENTH SCHEDULE

(Section 5C)

MODIFICATIONS TO FACILITATE THE

IMPLEMENTATION OF THE PENGURUSAN DANAHARTA

NASIONAL BERHAD ACT 1998

4 A. (1)Danaharta shall, in addition to the rights of a chargee under the Code, have at all times the right —

(a) to employ guards to protect and secure the land and all buildings on the land;

...

...

10. Danaharta's rights under this Schedule —

(a) may be exercised notwithstanding any order for sale made whether pursuant to any rules of court, the Code or any other law …;

(b) may be exercised without the need for any approval, confirmation or order of court;

...

...

BACKGROUND

[5] The background facts upon which the abovementioned legal provisions have to be considered are these: Danaharta Urus Sdn Bhd (the plaintiff in the court below

and respondent in this appeal), a company incorporated under the Companies Act 1965, is a wholly-owned subsidiary of Pengurusan Danaharta Nasional Berhad ('Danaharta') and has been prescribed as a subsidiary of Danaharta pursuant to s 60(1) and (2) of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act').

[6] Pursuant to agreements via letters dated 5 October 1981 and 20 August 1983 (exhs 'KA-1' and 'KA-2', 'the loan agreements') Bank Bumiputra Malaysia Berhad (now known as Bumiputra Commerce Bank Berhad ('the Bank')) had agreed to extend credit facilities totaling RM3,402,365.85 ('the loan') to Gabungan Ismail Penarek Sdn Bhd ('Gabungan') upon the request of Gabungan. The loan was secured, inter alia, by third party charges over immovable property known as HS(D) 310, Lot No. PTG 2094, Mukim of Penghulu Diman, District of Ulu Terengganu, State of Terengganu ('the charged land') belonging to the appellant in favour of the bank. The respondent's case was that pursuant to the loan agreements, the bank had disbursed the loan amounts to Gabungan.

[7] The respondent contended that Gabungan was in breach of the loan agreements in that it failed to settle any of its indebtedness to the bank. Gabungan's loan was thus a non-performing loan under the applicable banking rules. On 7 May 1999, the respondent acquired from the bank by way of statutory vesting under s 14 of the Danaharta Act the rights, title and interest relating to the Loan to Gabungan. Notice of the statutory vesting was given to Gabungan by the bank and the respondent via letters dated 7 May 1999 and 10 May 1999 respectively. By a letter dated 14 May 1999, the bank gave further notice of the vesting to the appellant. The respondent's interest as chargee of the charged land has been registered at the Kuala Terengganu Land Registry. According to the respondent, at all material times, Gabungan was and still is in breach of the loan agreements in that it failed to settle any of its indebtedness after the statutory vesting.

[8] It was the respondent's case that s 57 of the Danaharta Act and para 5 of the Fifteenth Schedule to the National Land Code 1965 ('the Code') conferred upon them the right to sell the charged land by way of private treaty. In exercise of this right, they had entered into a sale and purchase agreement dated 1 July 2002 as vendor, with Foy Construction Sdn Bhd as purchaser. By reason of the respondent's inability to fulfil its obligations under the said sale and purchase agreement to deliver vacant possession of the charged land as a result of the appellant's failure to vacate the charged land, the purchaser had terminated the sale and purchase agreement effective from 1 April 2003.

[9] The respondent's complaint was that its employees, servants and agents had been prevented from entry and access onto the charged land contrary to their entitlement in law to possession and control of the charged land. Access to the charged land could only be made via an adjacent land owned by the appellant held under Lot No PTG 3222 ('the appellant's adjacent land'). The respondent's servants or agents had, on 15 July 2002 and 24 September 2002, attempted to make site visits to the charged land via the appellant's adjacent land but were denied entry by the appellant, his servants and/or agents.

[10] The respondent then caused a writ of summons to issue on 13 September 2003 against the appellant seeking:

(a) a declaratory order that they were entitled to possession of the charged land;

(b) a permanent injunction restraining the appellant from carrying out any form of excavation or mining activities on the charged land; and

(c) other consequential reliefs.

[11] On the same day, 13 September 2003, the respondent also filed a summons in chambers (encl (3)) under O 29 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court for, inter alia, interim orders pending trial:

(a) an order that upon the plaintiff's undertaking to abide by any order the court may make as to damages, the defendant be restrained from carrying out/on any form of excavation and/or quarrying and/or mining activity/operations whatsoever or from carrying out/on any other form of development whatsoever on the said land, until further order of the court;

(b) an order that the plaintiff, its servants and/or agents be permitted to enter upon and to take possession of the said land including fixtures and fittings on the said land and other things attached thereto, pending further order by the court.

[12] The application for interim relief was grounded on the following facts. The appellant by himself, his agents, servants or otherwise, was carrying out quarrying and excavation activities on the charged land. These activities of the appellant had resulted in the depletion of the natural resources, an irreversible alteration and/or destruction of the physical state, nature and condition of the charged land. It had also resulted in the diminution in value and quality of the charged land thereby causing irreparable loss and damage to the respondent.

[13] The respondent's contention was that an order of possession of the charged land should be granted to them in order to, inter alia, preserve the value of the charged security and/or facilitate any future sale of the said land by private treaty. On the restraining order sought by the respondent, it was contended that they would suffer irreparable loss and damage in the value of the charged land if the excavation and quarrying activities of the appellant on the charged land was not restrained pending the adjudication and determination of their action against the appellant.

[14] The appellant took issue. He disputed that Gabungan was indebted to the respondent as alleged. According to the statement of defence filed, the contention of the appellant was that the Bank had granted two separate credit facilities to Gabungan (RM3,002,365.85 and RM400,000) and one to Jerlan Kuari Sdn Bhd (RM300,000) and that there were three charges of the charged land. The appellant alleged that the first charge covered only RM1,602,365.85 of the loan of RM3,002,365.85 to Gabungan and the third charge covered the loan of RM400,000 to Gabungan, making a total of RM2,002,365.85 only, while the second charge covered the loan to the other company. The appellant therefore denied that the charges covered the entire loan of RM3,402,365.85 to Gabungan. It was further

alleged that although the loan secured by the first charge was for RM1,602,365.85, only RM1,000,000 was released by the bank to Gabungan and that this amount had been fully settled by Gabungan.

[15] The validity of the said first, second and third charges are the subject matter of separate proceedings (ie Kuala Terengganu High Court Civil Suit No 22–81 of 2003) between the appellant as plaintiff, the bank as first defendant, the respondent as second defendant, and the Registrar of Titles as the third defendant.

[16] In opposing the respondent's application for an interim order pending trial, the appellant's case was that, as the registered proprietor of the charged land, he was entitled to peaceful possession and enjoyment thereof. The appellant then contended that the respondent had to proceed under ss 270–277 of the Code concerning 'Remedies of Chargees: Possession' in order to recover possession of the charged land; that a chargee is only entitled to possession of the charged land in the limited circumstances set out in Chapter 4 of Part Sixteen of the Code and that the respondent's application was contrary to s 44 of the Code.

[17] The appellant further contended that the application for an interlocutory injunction pending trial should also be dismissed as the charged land was subject to a restriction of interest (ie that it cannot be transferred, charged, or leased out without the consent of the State Authority). The appellant was of the view that the respondent would not be prejudiced by the appellant's continued possession of the charged land and that damages would be an adequate remedy.

Are there issues to be tried?

[18] The respondent's counsel in his submission argued that giving the words contained in s 57 of the Danaharta Act and the Fifteenth Schedule to the Code (ie paras 4A(1)(a) and 10) their plain and ordinary meaning, the respondent is clearly conferred with the power to recover possession of the charged land without the need to institute proceedings under the Code. Counsel further argued that the existence of a chargee's right of possession under the Code does not preclude the respondent's recourse to the right of possession under the Danaharta Act which is a special Act enacted to enable the respondent to discharge their functions quickly and with minimal delay for the purposes of promoting the revitalization of the nation's economy by injecting liquidity into the financial system.

[19] Reliance was also placed on s 17A of the Interpretation Acts 1948 and 1967 which states that a construction 'that would promote the purpose and object underlying the Act shall be preferred'.

[20] The respondent's counsel further submitted that the intention of the Legislature is amplified by the amendment of the Code by the inclusion of the new Fifteenth Schedule under the heading 'Modifications to facilitate the implementation of the Pengurusan Danaharta Nasional Berhad Act 1998'. The inclusion of this new Fifteenth Schedule in the Code reinforces and confirms the rights and powers of Danaharta and its subsidiaries conferred by the Danaharta Act.

[21] Before stating our views on this issue we would like to place on record that it is not necessary for us at this stage to give our firm findings as to the meaning to be ascribed to all of the statutory provisions referred to us in argument by the respective parties in this appeal. That must necessarily be determined at trial. The issue before us at this stage is a simple one, has the respondent discharged the initial burden that lies on them of showing that there are issues to be tried? Our views on this issue are these.

[22] The appellant has disputed Gabungan's indebtedness in this suit. He has also instituted separate proceedings challenging the validity of the charges which are also the basis upon which this suit is grounded. The court also notes that the appellant's attempt to strike out this case based on the same arguments was unsuccessful. The appellant had filed an appeal against the decision of the High Court dismissing the striking out application vide Court of Appeal Civil Appeal No T–02–564 of 2004, and in January 2006, that appeal had, with the consent of the respondent, been withdrawn with no order as to costs. By his conduct in withdrawing that earlier appeal, it could be inferred that the Appellant had accepted that there are issues to be tried in this case.

[23] Giving the words in s 57(1) of the Danaharta Act their plain and ordinary meaning, prima facie it would appear that the respondent is entitled under s 57(1) to take steps to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land so as to inspect, protect, secure, maintain or repair the land. Under s 57(6), the rights under s 57(1) are exercisable without the need for any approval, confirmation or order of court.

[24] The amendment of the Code by the inclusion of a new Fifteenth Schedule under the heading 'Modifications to facilitate the implementation of the Danaharta Act' reinforces the rights and powers of Danaharta and its subsidiaries. The special provisions in para 4A of the Fifteenth Schedule confer upon Danaharta, in addition to the rights of a chargee under the Code, the right to employ guards to protect and secure the land and all buildings on the land; and pursuant to para 10, the rights under the Fifteenth Schedule are also exercisable without the need for any approval, confirmation or order of court. We therefore agree, as submitted by the respondent's counsel, that for Danaharta to have the power to secure and protect the charged land, they must, by necessary implication, have the power to take possession of it.

[25] Thus, based on the appellant's own action, and applying the law to the circumstances of this case, prima facie, the respondent has satisfied the first test. There clearly are issues to be tried in this case.

Whether Damages an Adequate Remedy and Where Does the Balance of Convenience Lie?

[26] On the application of whether damages would be an adequate remedy and where the balance of convenience lie, it cannot be denied that carrying out quarrying and excavation activities on the charged land would result in the depletion of the natural resources and diminution in value and quality of the land bearing in mind the fact that the charged land has only a leasehold tenure of 30 years expiring on

8 June 2010. We therefore agree that in the circumstances of the present case, in the event of the respondent succeeding at the trial, damages would not be an adequate remedy.

[27] The learned judge was therefore right in holding that the balance of convenience lies in favour of the respondent.

[28] To conclude, the learned judge was right in allowing the respondent's application in terms of encl (3) and in issuing the interim order which he did.

[29] For the abovementioned reasons, the appeal was accordingly dismissed with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee